E SOPY

Supreme Court, U. S.
FILED
AUG 1 1972
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1971

No. 71-1706

DAVID EUGENE SHELTON,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

ALEX B. SHIPLEY, JR.
Assistant Attorney General
State of Tennessee
420 Supreme Court Building
Nashville, Tennessee 37219

Attorney for Respondent

DAVID M. PACK
Attorney General

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202

INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
ARGUMENT	2
CONCLUSION	4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1971

No. 71-1706

DAVID EUGENE SHELTON,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

OPINION BELOW

The unreported opinion of the Court of Criminal Appeals of Tennessee was entered and filed on 11 February 1972. The Supreme Court of Tennessee denied the petition for certiorari in an order filed 3 April 1972. Both the decision of the Court of Criminal Appeals and the order of the Supren Court are appended to the petition for certiorari filed on the behalf of David Eugene Shelton, petitioner.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

The respondent is not dissatisfied with the presentation of the questions by the petitioner, except to note that none of the issues raised presents a federal question of substance.

STATEMENT OF THE CASE

The petitioner, David Eugene Shelton, was convicted on 5 September 1970, in the Criminal Court of Greene County, Tennessee, of receiving a stolen automobile over the value of one hundred dollars ($100). The jury sentenced the petitioner to confinement for a period of four (4) years. The Trial Judge entered the judgment in accordance with the jury's verdict and announced a sentence of not less than three (3) nor more than four (4) years in the State Penitentiary. Upon the overruling of petitioner's motion for a new trial, the petitioner prayed for, was granted, and duly perfected an appeal-in-error to the Court of Criminal Appeals of Tennessee. The Court of Criminal Appeals of Tennessee in an unreported opinion filed on 11 February 1972 affirmed the judgment of the Trial Court. On 3 April 1972 the Supreme Court of Tennessee denied a petition for a writ of certiorari filed by the petitioner.

ARGUMENT

The respondent contends that the Trial Court was correct when, after hearing testimony out of the presence of the jury, he ruled that there was no search of the automobile. The evidence disclosed that one Robert Finchum, an off-duty highway patrolman, inspected an automobile which he was interested in purchasing and wrote down the serial number of that automobile.

The respondent further asserts that the conviction would not fall without the testimony of Finchum.

The testimony of Finchum, set forth at pages 15 thru 30 of the Appendix to the petition, shows that in late December or early January, Finchum, in an off-duty status, was working on his personally-owned pickup truck at a used car lot and junkyard managed by one Mr. Hensley. The petitioner arrived at the lot in a 1966 green Mustang automobile.

Although the petitioner did not speak with Finchum, the latter came to understand in a casual conversation with Hensley that the Mustang was for sale by the petitioner. (Appendix to Petition, pp. 16-17, 21-22). While petitioner was elsewhere on the lot, Finchum sought to examine the automobile. He asserted that he copied the serial number from the door frame in order to ascertain whether or not the automobile was stolen. The exceedingly low price which had been quoted him suggested this precaution. (Appendix to Petition, pp. 19, 23).

It is apparent that Finchum's examination of the automobile was merely that of an interested prospective purchaser. He testified that he knew that the petitioner was in the used car business and thus, it was quite likely that the car which he was driving was indeed for sale. Finchum's attention to the detail of the serial number was only that of a reasonable person who, in anticipation of a bargain, wants to assure himself that the item which he might purchase is legitimately in the flow of trade. There was no search in the constitutional sense and the evidence was properly admitted.

The respondent asserts that there was no search involved in the obtaining of the automobile serial number. The petitioner's argument is convincing wherein it is noted that

the "search" was not incident to any arrest. The respondent has never and is not now asserting such a theory. The petitioner's argument that exploratory searches are not approved is also correct. However, the respondent would point out that in the case at bar, Finchum sought to view only one thing, the automobile's serial number. He did so. Thus, his view was neither "exploratory" nor a "search".

The petitioner asserts that if officers had had probable cause to search the automobile, they would nevertheless have had to procure a search warrant. The respondent does not disagree, but notes that in this particular instance, at the time Finchum viewed the serial number there was no indication that any crime had been committed, and there was no cause to search the automobile for evidence of or fruits of a crime.

In view of the reasons asserted above, the respondent submits that there was no search and that the evidence procured by Finchum's view of the automobile serial number was properly admitted into evidence. In the instant case, the petitioner has failed to show that the question here involved is substantial or is of broad national concern.

CONCLUSION

As the petitioner presents no question which merits this Honorable Court's review upon a writ of certiorari, respondent respectfully submits that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ALEX B. SHIPLEY, JR.
Assistant Attorney General